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JAMES H. McKENNEY,
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116-410

No. 907

IN THE

Supreme Court of the United States.

Eureka Lake and Yuba Canal Company Consolidated,

Plaintiff in Error,

vs.

Superior Court of Yuba County et al,

Defendants in Error.

NOTICE OF MOTION TO DISMISS, AND BRIEF OF DEFENDANT.

Filed, ... *1885.*

No.

In the Supreme Court of the United States.

EUREKA LAKE AND YUBA CANAL COMPANY CONSOLIDATED,
Plaintiff in Error,

vs.

SUPERIOR COURT OF YUBA COUNTY ET AL.,
Defendants in Error.

(Number in the Supreme Court of California, No. 9,12 .)

Motion to Dismiss the Writ of Error, or to Affirm the Judgment.

And now comes the defendants in error in the above entitled cause, by A. L. Rhodes, their attorney, and move the said Court that the writ of error issued in said cause be dismissed on the grounds: that this Court has no jurisdiction of said cause; and that no federal question is involved in the cause.

And they also move that the judgment mentioned in the said writ of error be affirmed, on the ground: That the question on which the jurisdiction of this Court depends—if it has jurisdiction of said cause—is so frivolous as not to need further argument.

A. L. RHODES,
Attorney for Defendants in Error.

No.

In the Supreme Court of the United States.

EUREKA LAKE AND YUBA CANAL COMPANY CONSOLIDATED,
Plaintiff in Error,

vs.

SUPERIOR COURT OF YUBA COUNTY,
Defendant in Error.

(Number in the Supreme Court of California, No. 9,12[illegible].)

To W. W. Cope, Esq., Attorney for Plaintiff in Error:

Please take notice that on the 21st day of December, 1885, at the Court-room of the Supreme Court of the United States in Washington, at the opening of said Court on that day, or as soon thereafter as counsel can be heard, the said defendants in error will move said Court to order the dismissal of the writ of error in the above entitled cause, on the grounds stated in the accompanying motion.

Said defendants in error will, at the same time and place, move that the judgment mentioned in said writ of error be affirmed, on the ground stated in said motion.

A. L. RHODES,
Attorney for Defendants in Error.

In the Supreme Court of the United States.

EUREKA LAKE AND YUBA CANAL COMPANY CONSOLIDATED,
Plaintiffs in Error,

vs.

SUPERIOR COURT OF YUBA COUNTY ET AL.,
Defendants in Error.

Defendants' Brief on Motion to Dismiss.

The Eureka Lake and Canal Company Consolidated is a corporation, formed under the laws of the State of New York, for the purpose of conducting mining for gold and silver in the State of California, and selling water to others for mining purposes.

Ever since the year 1865, the corporation has been engaged in hydraulic mining in the county of Nevada, in the State of California.

During that time, it deposited its mining debris in the Yuba River, or its tributary streams, from which it flowed into the Yuba River.

On October 3, 1882, Yuba County commenced an action against the corporation to restrain it from discharging its mining debris into the Yuba River, or selling water to others for mining purposes, whereby mining debris might be caused to flow into the Yuba River.

There is no question in this case, as to the sufficiency

of the allegations of the complaint in that case, to entitle plaintiff to an injunction against the defendant.

At the commencement of the action the Court, without notice to the corporation, issued a temporary injunction, restraining it from depositing its mining debris into the Yuba River or its tributary streams.

The summons was served upon David Cahn, the person who had been designated by the corporation as the person upon whom service of process against the corporation might be served, as required by the laws of the State. No other person had been designated by the corporation for that purpose, though subsequently another person was designated in place of David Cahn.

The corporation moved to set aside service of process upon Cahn, mainly on the ground that he was not the managing agent for the corporation; but the plaintiff in the action produced from the office of the Secretary of State an instrument in which, in 1880, the corporation designated David Cahn as the person upon whom process against the corporation might be served; and the Court denied the motion to vacate the service of summons.

The temporary injunction was served upon the corporation by service upon David Cahn, which service was previous to the designation of another person, as above mentioned.

In January, 1883, the corporation appeared in the action by J. K. Byrne and W. C. Belcher, and demurred to the complaint.

On April 25, 1883, upon motion of the plaintiff, the Court in which the action was pending ordered that the corporation show cause, on May 14, 1883, why it should not be punished for the violation of the temporary injunction.

The order was based upon affidavits filed by the plaintiff in the action, showing the violation of the injunction.

The order contained all the necessary and usual recitals, and directed that a copy of it, and copies of the affidavits upon which it was issued, should be served upon J. K. Byrne or W. C. Belcher, the attorneys of record of the said corporation.

Similar orders had previously been made upon the same affidavits, and had been returned not served.

The plaintiff in the action showed to the Court by affidavits, that the person upon whom service should be made—the person designated by the corporation for that purpose, as required by the statute of the State—evaded service; and the Court thereupon ordered, as above stated, that service of the process should be made upon one of the attorneys of record of the corporation.

The order and affidavits were served upon J. K. Byrne April 28, 1883.

The corporation moved that the order to show cause be vacated on the grounds:

1. That the Court had no jurisdiction of the corporation.

2. That the Court had no jurisdiction to issue the temporary injunction against the defendant, because it suspended the general and ordinary business of the corporation, and because the temporary injunction was void, as the Judge who issued it was disqualified.

3. That the injunction was granted without any notice to the proper officer of the corporation.

4. That it was not served upon the corporation.

5. That the order to show cause was not served upon the corporation.

On May 14, 1883, the motion to punish the corporation for contempt, for violation of the injunction, was

heard. The corporation made default, and the Court found that the facts alleged in the affidavits were true; that the corporation was guilty as charged; and ordered it to pay a fine of $250 in one case, and $500 in the other; and that execution issue therefor.

The proceedings and the record are substantially the same in the two cases, so far as they have any bearing on the questions that may be considered by this Court.

Writs of certiorari were, upon the petitions of the corporation, issued by the Supreme Court of the State in each of these cases, for the purpose of annulling the above mentioned orders, and thereupon the records in these cases were brought up to that Court. The Court, after due consideration of those records and orders, affirmed the orders.

The decision of the Court in those cases is found in 5 West Coast Rep., 179.

Grounds of the Motion to Dismiss the Writs of Error.

1. This Court has no jurisdiction of the causes of action.

2. The defendant corporation has not been deprived of due process of law.

3. No Federal question is presented by the orders in question, or the proceedings upon which they were based.

Points in Support of the Motion.

I.

It was urged by the corporation defendant in the Court below, that the service of the injunction on David Cahn was not sufficient notice to the corporation.

The Supreme Court of California, in its decision, disposes of the point against the corporation. It is there held that the service upon the person who was designated by the corporation was sufficient service, the Court holding that the Statute of 1872, requiring foreign corporations to designate a person upon whom service of process might be made, was in force.

Eureka Lake, etc., vs. *Superior Court of Yuba*, 5 W. C. R., 179.

The validity and effect of the injunction are not dependent upon its being served upon the defendant. The defendant may be punished for the violation of the injunction if he is informed or knows of its issue, although it may not have been served upon him.

High on Injunction, 2d Ed., Secs. 1421–4, 1444.
Ex parte Cottrell, 59 Cal., 421.
Golden Gate vs. *Superior Court*, 2 West Coast Rep., 737.

II.

THE CORPORATION WAS NOT DEPRIVED OF DUE PROCESS OF LAW. IT HAD DUE NOTICE OF THE PROCEEDING TO PUNISH IT FOR CONTEMPT.

It is further objected by the corporation defendant, that the order adjudging the corporation guilty of contempt in violating the injunction is void, because it was made, as

is claimed, without giving the corporation defendant an opportunity to be heard; in other words, that the corporation was debarred of due process of law in that respect.

This is the only question in the case, and its solution would not seem difficult.

The Court undoubtedly had jurisdiction of the cause of action stated in the complaint.

The Court also acquired jurisdiction of the corporation defendant; for not only was the service of summons made upon the person designated by the corporation for that purpose, but the corporation appeared in the action by its attorneys and demurred to the complaint. From that period of time, the Court had jurisdiction for all the purposes of the action.

Thereafter, questions might arise as to the regularity of the proceedings, but none as to the jurisdiction of the Court over the corporation, or as to the sufficiency of the notice to the corporation of *all subsequent proceedings in the action.* There is no ground for saying that due process of law requires that each party, after he has appeared in person or by attorney, shall have further notice of each of the steps in an action.

The Court has the inherent jurisdiction to punish contempt; and the Code of Civil Procedure, Sec. 1209, enumerates, among other acts which constitute contempts, "disobedience of any lawful order." There must of necessity be some mode in which the parties to an action pending in a Court, can be reached by the Court, when it is shown that a contempt has been committed by one of the parties, and that such party conceals or absents himself, or, in some other manner, avoids service of the order to show cause.

Has the Court in such case competent authority to direct service of the order to be made upon the attorney of

the party avoiding service? The question was presented to the Supreme Court of the State in

Golden Gate vs. *Superior Court, supra,*

and the Court upheld the service. It was of course upheld in the two causes now on hearing.

The Statute does not provide the manner of service in matters of contempt. It does provide—Code of Civil Procedure, Sec. 1015,—that all papers in a case shall be served upon the attorney of the party, except the summons or other process, and papers to bring the party into contempt. If all the papers in the case except those above mentioned, may be served upon the attorney of the party who has appeared by his attorney, there would seem to be no reason why the code might not have ~~been~~ provided that all the papers in the case, without any exception, should be served upon the attorney, after the entry of his appearance.

The constitutional provision of the 14th Amendment, intended to secure to a party notice and an opportunity to be heard before judgment—in other words, due process of law—is no more violated by service of the notice in a matter of contempt, upon the attorney, than it is by a like service in a matter of taxation of the costs in an action. It must be true that the Legislature has competent power to provide that the service of *all* the papers and notice in an action, may be made upon the attorney of the parties after they have appeared by their attorneys, or it has no power to provide that any paper or notice shall be served in that manner.

It is provided by Sec. 187, Code of Civil Procedure, that "when jurisdiction is conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given, and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code, or the Statute, any suitable process or mode of pro-

ceeding may be adopted, which may appear most comformable to the spirit of this Code." The Court below, in pursuance of this provision, and with the approval of the Supreme Court of the State, directed service to be made upon the attorney of the corporation, as the Code had made no provision for service in such matter, when the defendant had succeeded in avoiding service in the usual manner. If the Legislature could have provided that papers in contempt proceedings should or might be served upon the attorney of the party charged, then the order of the Court in question here may be erroneous, because not within the provisions of Sec. 187 ; yet it is not illegal and void, as repugnant to the provisions of the 14th Amendment.

The only mode in which a corporation can be served, is by service upon some person acting as its agent, or who has been designated as the person upon whom service upon the corporation may be made. It is the statute, and not the corporation, that directs that the President, Secretary, etc., or some person designated by the corporation, is the proper person upon whom service must be made in order to bind the corporation. Could not the statute, with equal validity, declare that service may be made upon the attorney of the corporation?

Pennoyer vs. *Neff*, 95 U. S., 714.

Upon the point that service of the order to show cause may be made upon the attorney, we cite also:

Pitt vs. *Davidson*, 37 N. Y., 239.
Albany Cy. Bk. vs. *Schemmerhorn*, 9 Paige, 372.

Respectfully submitted.

A. L. RHODES,
Attorney for Defendants in Error.